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December 31, 1996

EX PARTE

BY HAND DELIVERY

Ms. Meredith Jones
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, NW, Room 918
Washington, DC 20554

Re: CS Docket No. 95-184 - Telecommunications Services Inside Wiring
CS Docket No. 92-260 - Customer Premises Equipment

Dear Ms. Jones:

On behalf of TCA Cable TV, Inc.; Marcus Cable Operating Company; Multimedia Cablevision, Inc. and Benchmark Communications, we are responding to numerous filings and *ex parte* contacts by OpTel, Inc. ("OpTel") and others arguing that the Commission should apply a "fresh look" policy, developed in the context of common carrier regulation, to cancel contracts between cable operators and multiple dwelling unit ("MDU") owners.[1] OpTel's "fresh look" proposal is not appropriate in this proceeding because:

[1] OpTel has made this same argument in several different FCC proceedings, apparently believing that repetition will somehow lend credibility to its position. *See, e.g.*, OpTel comments in CS Dkt. No. 96-113, FCC Third Report to Congress on the Status of Competition in the Video

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- The only parties that stand to benefit from OpTel's proposal are MDU owners and "private cable" operators. OpTel's proposal would not increase competition or choice at the consumer level.

- There is no legal basis for the Commission to interfere with established contractual arrangements between MDU owners and cable operators.

- Contrary to OpTel's unsupported allegations, contracts entered into between MDU owners and cable operators substantially benefited MDU owners as well as cable operators.

- Cancellation of contracts between MDU owners and cable operators would violate cable operators' First and Fifth Amendment rights.

A. OpTel's "Fresh Look" Proposal Would Not Increase Competition Or Choice At The Consumer Level

The sole purpose of OpTel's proposal is to expel cable operators from MDUs in order to advance its own exclusive deals with MDU Owners, landlords and developers (herein referred to jointly as "MDU Owners"). Free from the regulatory costs and burdens of franchising,[2] "private cable" providers, such as OpTel, typically pay a fee or "kickback," in the words of one court,[3] to MDU Owners in exchange for exclusive access to subscribers. While MDU Owners benefit monetarily from granting exclusivity to a "private cable" provider, MDU *residents* typically experience increased rates and fewer programming choices.

Marketplace; and, most recently, Comments of OpTel in GN Dkt. No. 96-113, Section 257 Proceeding to Eliminate Market Entry Barriers for Small Businesses, filed Sept. 27, 1996. It also appears from FCC records that OpTel has made an unprecedented number of *ex parte* contacts with FCC staff over the last several months to assert its "fresh look" concept. Moreover, even at this late date (November 20 and 21 respectively), GTE and Pacific Telesis have weighed in with *ex parte* filings and meetings to support the "fresh look" theory advanced repeatedly by OpTel and a few trade associations whose members stand to benefit financially if this "fresh look" policy is adopted.

[2] SMATV and wireless operators are not subject to FCC rate regulation, technical standards or customer service requirements, nor do they have franchise requirements for service, maintenance facilities, access channels, or franchise fees.

[3] *Multichannel TV Cable v. Charlottesville Quality Cable*, No. 93-0073-C (W.D. Va. Dec. 3, 1993), *aff'd*, 22 F.3d 546 (4th Cir. 1994).

Accordingly, the only entities who stand to benefit from OpTel's proposed "fresh look" policy are MDU Owners and "private cable" operators, such as OpTel.

Not surprisingly, OpTel's filings do not address the consequences to MDU residents of its proposal, but instead assert, without any evidentiary support, that a "fresh look" policy will somehow further competition. In fact, the only competition that will be furthered is between video service providers for the dollar amount that MDU Owners will pocket in exchange for granting exclusive rights to the building. OpTel's proposal does nothing to increase competition or choice at the consumer level, even though MDU residents will ultimately absorb in rate increases the added cost of the "kick-back" fees to the landlord.

Indeed numerous states have recognized the potential harm to consumers that would result from permitting MDU Owners to solicit bids for the right to serve their properties. In the interest of protecting tenants, states have regulated landlords' powers over utilities and other tenant services for many years. Numerous state laws and policies currently prohibit MDU Owners from receiving kickbacks for tenant services. In addition, several states have enacted laws specifically restricting landlords' ability to extract payments from cable operators. *See, e.g.*, Conn. Gen. Stat. § 16-333A(a); Va. Code Ann. § 55-248.13:2; N.Y. Exec. Law § 28. Any action by the Commission facilitating MDU Owners' ability to extract payments from cable operators (or other video providers) would be inconsistent with long established public policy against such kickbacks.

B. The Commission Lacks Legal Authority To Apply OpTel's "Fresh Look" Proposal To Contracts Between Cable Operators And MDU Owners

The "fresh look" doctrine, developed in the context of monopoly common carrier regulation, is inappropriate in the context of cable television. As the Commission and courts have recognized, common carrier service and cable service are "very different creatures." *Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration, 59 FR 63909, 63971 (November 17, 1994) (Separate Statement of Commissioner Chong)(quoting *National Cable Television Association, Inc., et al., v. FCC*, 33 F.3d 66 (D.C. Cir. 1994)). Indeed, Section 621(c) of the Communications Act states that cable systems "shall not be subject to regulations as a common carrier or utility by reason of providing any cable service." 47 U.S.C. § 541(c). Nevertheless, OpTel is advocating that the Commission apply to cable operators a policy adopted in the context of monopoly common carrier regulation.

In adopting a "fresh look" policy in other contexts, the Commission relied heavily upon its broad powers under Sections 201 to 205 of the Communications Act, which

empower the Commission to prescribe just and reasonable charges for tariffed LEC offerings, including termination charge provisions. *Expanded Interconnection with Local Telephone Company Facilities*, Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd. 7341, 7348 ¶ 16 n. 23 (1993); *Competition in the Interexchange Marketplace*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2682 ¶ 25 (1992). More recently, in the *First Report and Order*, CC Docket 96-98, FCC 96-325 (rel. Aug. 8, 1996), concerning interconnection between LEC carriers and CMRS service providers, the Commission relied upon the broad authority over incumbent LECs conveyed to it by Section 251 of Communications Act. *Id.* at ¶ 1095.

The Commission's authority to regulate cable operators' rates is much more narrowly defined. Section 623(a)(1) prohibits the Commission from regulating cable service rates except to the extent provided in Sections 623 and 612 of the Communications Act. 47 U.S.C. § 543(a)(1). And, in the context of MDU rates, Section 623 dictates that rates are presumed reasonable unless proven to be predatory. 47 U.S.C. § 543(d). Indeed, the Commission is prohibited from regulating cable operators' rates *at all* in areas subject to effective competition. 47 U.S.C. § 623(a)(2). Accordingly, the Commission does not have authority to apply a "fresh look" or similar policy to cable operators' agreements with MDUs.

Moreover, the Commission's primary reason for adopting the "fresh look" policy in the limited context of certain common carrier agreements was to make way for new entrants where no competitive alternatives previously existed. *See, e.g., Expanded Interconnection Order*, 6 FCC Rcd at 7346 (declining to apply "fresh look" policy to customers with CAP arrangements that clearly had competitive alternatives when they struck their deals). Contrary to OpTel's unsupported allegations, competitive alternatives to cable service existed when the subject contracts were entered into. SMATV operators were a significant competitive presence at that time and thus, do not deserve the extraordinary assistance and protection afforded to new entrants in a very limited number of common carrier services.

The only instance in which the Commission has applied a similar policy outside of common carrier regulation is in the context of an experimental license issued to GTE for air-ground service. There the Commission relied upon its broad authority under Section 303(r) of the Communications Act, which authorized the Commission to apply such conditions to the grant of a license "as may be necessary to further the public interest, convenience or necessity," to nullify the termination penalties in GTE's agreements that exceeded the term of its experimental license. *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, 6 FCC Rcd 4582, 4583-84 n. 13 (1991). In support of its authority to modify contractual arrangements entered into during the

term of the license, the Commission cited its authority to revoke the experimental license outright. *Id.* at n. 9. Moreover, in that case, GTE had been the sole provider of ground-air service when it entered into the contracts at issue, and, in fact, was the sole provider because of the experimental license granted by the FCC.

Unlike the circumstances involved in that case, cable operators did not have an exclusive privilege to enter into contracts with MDUs. Moreover, the Commission's authority to regulate cable operators and their rates is much more limited than the Commission's authority to regulate common carriers with experimental licenses for use of the public airways.

C. The Circumstances Surrounding The Contractual Arrangements Between Cable Operators And MDU Owners Do Not Support Application Of A "Fresh Look" Doctrine

OpTel argues that contracts entered into between cable operators and MDU owners primarily in the late 1970s and 1980s were, in effect, "perpetual," because some of those agreements linked the duration of the contract to the duration of the cable operator's franchise. However, in describing the circumstances under which these contracts were made, OpTel incorrectly portrays cable operators as powerful monopolists and MDU Owners as choiceless victims with no competitive alternative to cable.

On the contrary, competitive alternatives to cable existed at the time many of the MDU service agreements were made in the 1970s and 1980s. Private cable operators, particularly SMATV systems, provided, and aggressively marketed, video programming services to MDUs. In fact, the expansion of SMATV systems paralleled that of cable systems after deregulation of receive-only domestic earth stations. *See First Report and Order*, 74 F.C.C. 2d 205 (1979). Thus, MDU Owners generally were able to choose between a franchised cable provider and an alternative competitor such as a SMATV operator. In addition, many MDU building owners constructed their own SMATV systems.

Second, MDU Owners benefited from the competition between cable operators and SMATV providers, as is reflected in the terms of the contractual arrangements, many of which required significant payments by the cable operator to the MDU Owner. In addition, most MDU Owners received bulk discounts from cable operators, largely because of SMATV competition. Moreover, MDU Owners benefitted significantly from cable's expanded video services, which made the MDUs more marketable to tenants. Thus, MDU Owners were not only willing but eager to agree to long term contracts to lock in payments and other favorable terms. Likewise, cable operators made concessions in exchange for longer duration. Thus,

the duration of these agreements was negotiated fairly between two competent business entities.

Moreover, cable operators made large capital investments in reliance upon the terms of these agreements.[4] As the Commission has recognized in the cost of service proceedings and elsewhere, initial capital investment in cable systems in the early years is often not recovered until the later years. *Second Report and Order, First order on Reconsideration, and Further NPRM* in MM Docket 93-215, FCC 95- 502 ¶¶ 64-72 (rel. January 26, 1996). If the Commission were to apply a "fresh look" policy in the context of cable/MDU agreements, many cable operators would be precluded from fully recovering their investment and MDU Owners would be unjustly enriched at the expense of cable operators and their subscribers.

D. Permitting MDU Owners To Terminate Contracts Would Violate Cable Operators' Constitutional Rights

OpTel's proposal, which would provide a mechanism for MDU Owners to unilaterally cancel their contracts with cable operators, would amount to an unconstitutional taking of property in violation of the Fifth Amendment, unless cable operators were justly compensated for the fair market value of the contracts. *BFP v. Resolution Trust Co., 114 S. Ct. 1757, 1761 (1994); United States v. 50 Acres of Land*, 469 U.S. 24, 26 & n. 1 (1984) (citing *United States v. Miller*, 317 U.S. 369, 374 (1943)("what a willing buyer would pay in cash to a willing seller"). Fair market value is not merely the cost of the wiring, but must include "the property's capacity to produce future income. . .",[5] which in the cable industry has traditionally been measured generally between $1,000-$3,000 per subscriber. Thus, if a "fresh look" policy is adopted, cable operators must be justly compensated.

Furthermore, cable operators' provision of multichannel video programming is protected by the First Amendment. Thus, any action taken by the Commission in favor of one speaker over another would be subject to constitutional scrutiny. *Turner Broadcasting, Inc. v. FCC*, 114 S Ct 2445, 129 L Ed 2d 497 (1994).

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[4] In many cases that investment included substantial payments by cable operators to MDU Owners in order for the cable system to gain access to the property in the first place.

[5] *Yancy v. United States*, 915 F.2d 1534, 1542. *See also*, "Consolidated Reply Comments" of Cole, Raywid and Braverman filed in the referenced proceeding, April 17, 1996 at 20-23.

E. Conclusion

OpTel is trying to rewrite history to conform to a strained, novel legal argument. And yet, significantly, OpTel has failed to present any evidence in support of its vacuous accusations that cable operators somehow strong-armed MDU Owners into onerous and unfair contractual arrangements. The factual scenario presented by OpTel is simply inaccurate. Not only were competitive alternatives to cable available at the time these contracts were made, the terms of the agreements themselves confirm that cable operators and MDU Owners had comparable bargaining power and both stood to gain from the agreements.

Accordingly, OpTel's repetitious proposals that the Commission apply a "fresh look" policy to cable operators' MDU agreements will not serve the public interest and must be rejected.

Very truly yours,

COLE, RAYWID & BRAVERMAN, L.L.P.

By 
Robert L. James
Maria T. Browne

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